No. 89-1361

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

—v.—

LARRY WOLLERSHEIM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent Larry Wollersheim rests his opposition to the petition of the Church of Scientology of California ("the Church") on the demonstrably false premise that the jury must be presumed to have returned its verdict based upon unprotected acts of secular coercion and not on the basis of Wollersheim's voluntary participation in auditing, *per se*, which the courts below found to be a religious practice.[1] Church's Petition ("Pet.") at 23a, 48a, 51a. Thus, Wollersheim relies upon the court of appeal's conclusion that there was sufficient evidence in the record to show that Wollersheim participated in auditing because of secular coercion, Respondent's Brief in Opposition ("Resp. Br.") at 9, and the trial court's instruction that the jury not evaluate the *validity* of Scientology's beliefs or practices, *id.* at 7-8, 10.

Wollersheim's new counsel attempts to rewrite the history of this case, much of which was written by Wollersheim and his prior counsel over a ten year period. As amply demonstrated in the Church's petition, it simply is uncontrovertible that Wollersheim and his trial counsel repeatedly invited the jury to evaluate the purported emotional *effect* of auditing upon Wollersheim, and to award compensatory and punitive damages if it found that auditing caused emotional distress and constituted "outrageous conduct". Pet. at 3-7, 10. The trial court's instructions not only did not attempt to prevent the jury from doing so, but, in the context of the trial,

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1 By the term "secular coercion," the Church distinguishes the "coercion" theory created by the court of appeal, Pet. at 25a, from the "coercive persuasion" or "thought reform" that Wollersheim alleges is inherent in Scientology's core religious practice of auditing, and upon which Wollersheim based his theory of liability at trial. Throughout this case, Wollersheim has claimed that his participation in auditing was "involuntary" solely because auditing itself constituted "thought reform," which led him to undertake more auditing. *See* Church's Pet. at 16-20; Brief of National Council of Churches of Christ in the USA and Council on Religious Freedom As Amicus Curiae, at 6-13 (discussing "coercive persuasion" theory presented by Wollersheim).

invited it to do so. And the court of appeal's effort to find some evidence to support an alternative theory of secular coercion that was never argued or presented to the jury violates every known principle of appellate review in a case involving possible infringement of First Amendment rights.

1. Wollersheim mistakenly argues that the jury was instructed that it could not find liability "based upon an evaluation of petitioner's religious beliefs, or upon its religious practices." Resp. Br. at 10. Wollersheim then argues that since the jury must be presumed to have followed the court's instruction, the jury's verdict could not possibly have turned upon an evaluation of the harms allegedly caused by the religious practice of auditing.

Wollersheim fundamentally mischaracterizes the trial court's instruction, which merely instructed the jury that it could not "base [its] verdict in any way on any evaluating of the *validity* of the religious beliefs and practices of Scientology" (RT 14,778) (emphasis added).[2] The trial court *refused* to give an instruction, requested by the Church, that the jury could not base its verdict based upon an evaluation of the purported emotional *effect* of auditing upon Wollersheim (App. A312).

The distinction is no mere quibble; it goes to the heart of Wollersheim's case. As demonstrated in the Church's petition, from beginning to end Wollersheim emphasized to the jury his claim that auditing, *per se*, caused him emotional distress and constituted outrageous conduct. Pet. at 4-5. In his closing argument to the jury, Wollersheim's counsel stated:

> [P]laintiff was subjected to Level II programming or auditing by the defendant . . . which conduct was extreme and outrageous . . . . [RT 14,456] . . . plaintiff experienced severe personality stress caused by auditing. . . . [RT 14,460] . . . for periods of time he was a psychotic as a result of this auditing surfacing or precip-

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2 Citations to "RT _____" are to the Reporters Transcript of the trial court proceedings. References to "App. A _____" are to pages in the Appellant's Appendix in Lieu of Clerk's Transcript, filed in the court of appeal.

> itating the symptoms of the bipolar disorder . . . without his auditing he probably never would have been bothered by [bipolar disorder] in his whole life. [RT 14,493]. . . . In the process of subjecting Larry Wollersheim to the auditing, [the Church] precipitated his bipolar disorder. [It was] precipitated by . . . *particularly* the auditing processing . . . . [RT 14,713].

See also RT 14,467; 14,490-93.

Both in the Supreme Court of California and here, Wollersheim himself has acknowledged that his theory of the case at trial rested principally upon his claim that auditing was "outrageous conduct". In his petition to this Court, No. 89-1369, for example, Wollersheim states that his "evidence and experts demonstrated auditing was *inherently* and *intrinsicly* [sic] a coercive persuasion type practice based on creating hypnotic or trance like states of increased suggestibility and decreased independent judgment."[3] Wollersheim Petition at 4 (emphasis added). He acknowledges that the so-called "upper level" auditing "materials were the very areas most closely associated with the five cataclysmic breakdowns." *Id.* He concludes that "there is adequate proof the coercive persuasion aspects of auditing caused real [emotional] harm to Wollersheim and that Scientology's conduct was outrageous." *Id.* at 7; *see also* Pet. at 10 (quoting Wollersheim's Petition for Review in the Supreme Court of California).

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3 The "experts" relied upon by Wollersheim were psychologist Margaret Singer and sociologist Richard Ofshe, who recently have been precluded by a federal district court in California from testifying as experts on "coercive persuasion" and "thought reform" on the ground that their theories are "not widely recognized in the scientific community." *United States* v. *Fishman*, No. CR-88-0616-DLJ (N.D. Cal. March 15, 1990). The fact that Wollersheim would have been prevented from presenting his theory of recovery if he had sued in federal court in California under diversity jurisdiction, but instead was permitted to obtain a jury verdict of $30,000,000 based upon that theory because of the happenstance that he sued in the California *state* courts, further highlights the conflict among the lower courts concerning claims, of "thought reform" against minority religions. See Church's Brief in Opposition to Wollersheim's Petition for Writ of Certiorari, No. 89-1369, at 3 n.3.

Indeed, Wollersheim directly contradicts himself in his Brief in Opposition. While arguing at one point that the jury must be presumed not to have considered a claim based upon auditing, Resp. Br. at 10, he admits elsewhere that his claim was based precisely on Singer's testimony that auditing "was part of a process of coercive 'thought reform' that precipated or was the major cause of respondent's severe mental and emotional disorders." Resp. Br. at 7.

In short, it simply is absurd to claim, as Wollersheim does here, that it must be presumed that the jury did not base its verdict, at least in major part, upon the purported emotional effect of auditing upon Wollersheim. In the context of the testimony of Wollersheim, Singer, and Ofshe, and of the closing argument of Wollersheim's counsel, the court's instruction that the jury not "evaluate" the "validity" of Scientology beliefs and practices clearly was not understood by Wollersheim's counsel or the trial court, and could not possibly have been understood by the jury, as precluding evaluation of the very claim most heavily emphasized by Wollersheim, *i.e.*, the alleged *effect* of auditing upon Wollersheim.

Thus, at the least, "[i]t is impossible to conclude that state power has not been exerted to compensate [Wollersheim] for the direct consequences of *nonviolent*, constitutionally protected [auditing] activity." *NAACP* v. *Claiborne Hardware*, 458 U.S. 886, 923 (1982) (emphasis added).

2. Further contradicting his argument that the jury did not base its verdict at all on auditing, Wollersheim argues that he *did* recover damages for auditing purportedly undertaken as a result of secular coercive acts. Resp. Br. at 9-10. This is the first time in the ten year history of this case that Wollersheim himself has made this argument, in contrast to his claims that he undertook auditing because of the "coercive persuasion" purportedly "inherent" in the religious practice of auditing itself. *See*, *e.g.*, Wollersheim Petition, No. 89-1369, at 4. In any event, his wholly conclusory argument derives solely from the improper and unsubstantiated findings of the court of appeal. Wollersheim does not deny his own extensive testi-

mony and that of Singer that Wollersheim participated in auditing because he wanted to, that he became "addicted" to auditing, and that he continued to engage in it voluntarily. Pet. at 4-6. Indeed, he does not point to a single passage in the trial transcript where he testified that he was forced or threatened to continue auditing, or where he limited his theory of recovery to the secular coercion theory created by the court of appeal. He certainly does not and cannot point to a jury instruction which limited the jury to a finding of liability if and only if, and only to the extent that Wollersheim was induced to participate in auditing by secular coercion. To the extent that Wollersheim relied upon a theory of secular coercion, such a limiting instruction was required by *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 730-35 (1966), and *Claiborne Hardware*, 458 U.S. at 915, 917-18, 923.[4]

Rather, like the court of appeal, Wollersheim asserts that the jury *might* have found that some of Wollersheim's auditing was induced by secular coercion, and that the jury *might* have based its verdict upon such coerced auditing. Resp. Br. at 9. Even accepting that possibility (which we do not), it does not negate the possibility (indeed, the virtual certainty) that the jury returned its verdict based upon the harms purportedly caused by auditing, *per se*. As the Church has repeatedly shown, where the possibility exists that damages were imposed for constitutionally protected activity, the verdict must be reversed, not affirmed. Pet. at 20-23.

Faced with the failure of the trial court to limit the jury solely to consideration of unprotected activity, the court of appeal purported to find some evidence of unprotected, coercive activity which, if standing alone, might justify a verdict for Wollersheim. For the reasons stated in the Church's petition, the court of appeal's failure to review independently the record and its refusal to reverse and remand for a new trial turned upside down the constitutionally mandated rules for appellate review of a case involving claims that rest in whole

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4 No such jury instruction was suggested or contemplated by either party or by the trial court precisely because that was never Wollersheim's theory of recovery at trial.

or in part upon activity presumptively within the zone of First Amendment protection.[5] *See* Pet. at 20-26.

3. Wollersheim's response to the Church's argument that the $2,000,000 punitive damage award violates the First Amendment is wholly premised on the same mistaken assumption as his argument in support of the jury's finding of liability—that the jury's award of punitive damages could not be "based, even in part, on any activities" protected by the First Amendment. Resp. Br. at 12. As demonstrated, *supra*, and in the Church's Petition, however, liability and damages were almost certainly imposed for the Church's peaceful religious practice of auditing. Even if there are circumstances which would permit imposition of compensatory damages arising out of such religious practices, the state has no compelling interest in providing a windfall in the form of punitive damages. *See Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 349-50 (1974). The same concerns about "punish[ing] expressions of unpopular views" that the Court expressed in *Gertz*, *id.* at 350, is at least equally applicable with regard to minority religions. Similarly, members of a religious organization, who are the true victims of ruinous punitive damage awards, should receive the same protections as members of labor unions or municipal taxpayers. *See Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 (1979).

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5 Wollersheim's conclusory assertion that the court of appeal "did engage in the independent examination of the whole record that petitioner seeks," Resp. Br. at 11, is demonstrably false. The court of appeal explicitly reviewed the evidence only to determine whether "[t]here is substantial evidence to support the jury's finding" on the secular coercion theory. Petition at 10a. No effort was made to review independently the record in the manner mandated by cases such as *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). *See* Pet. at 23-26. While asserting that the court of appeal examined the whole record, Wollersheim in fact highlights the absence of evidence to support the court of appeal's novel secular coercion theory in his failure to cite to a single passage in the record in support of this theory.

4. This Court has just granted review in a case raising a Fourteenth Amendment due process challenge to an award of punitive damages virtually identical to the Church's due process claim here. Pet. at 28-29. *Pacific Mutual Life Ins. Co.* v. *Haslip*, No. 89-1279, *cert. granted* (U.S. April 2, 1990). This case, like *Haslip*, compellingly demonstrates the due process problems inherent in a punitive damage system under which the jury is instructed that "[t]he law provides no fixed standard . . . [b]ut leaves the amount to the jury's sound discretion" (RT 14,796), and that punitive damages may be awarded against a corporation on a *respondeat superior* basis (RT 14,783-84). Indeed, in this case, the *respondeat superior* instruction was given in apparent disregard of state law that requires ratification of an agent's acts by the corporation, thereby exacerbating the unbridled discretion of the trial court and jury by this disregard of the one limitation established by the legislature. *See* Cal. Civ. Code § 3294(b); Church's Pet. at 28 n.23.

Wollersheim argues that the court of appeal's remittitur cures the due process violation. Resp. Br. at 13. In fact, that court's unexplained imposition of a $2,000,000 award, while less "preposterous," Pet. at 43a, than the jury's $25,000,000 award, is no less arbitrary or irrational. This case is no different than *Haslip*, in that the potential for judicial review and remittitur does not cure the due process violation. *Pacific Mutual Life Ins. Co.* v. *Haslip*, 553 So.2d 537, 543 (Ala. 1989).[6] In fact, this case is more worthy of review because it raises the added spectre of the standardless imposition of punitive damages to "punish . . . unpopular views." *Gertz*, 418 U.S. at 350.

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6 In *Haslip*, the Alabama Supreme Court found that the trial court applied the appropriate principles of law to the punitive damage claim, held a hearing, and set out the reasons why the award should be sustained, and the state Supreme Court found that the facts supported the trial court's decision. 553 So.2d at 543. Here, by contrast, the trial court simply issued a one-word denial to the Church's post-trial attack on the verdict. Pet. at 45a. The court of appeal adequately explained why the $25,000,000 award was "preposterous," Pet. at 43a, but it never attempted to justify its own $2,000,000 punitive damage award. Pet. at 42a-43a.

5. Wollersheim's statement of the case, Resp. Br. at 2-8, contains several significant misstatements, which the Church corrects only to demonstrate that this case directly presents the fundamental constitutional questions raised by the Church's petition.

First, Wollersheim claims "that the petitioner's practice of 'auditing' never was presented to him as a religious practice." Resp. Br. at 2. Based on irrefutable evidence to the contrary, however (RT 1169-70, 1257-60, 4960-62, 7553; Exhibits 90, 244, 253, 255(a), 263, 317), the trial court explicitly rejected this contention and cut off further evidence or argument on the subject (RT 7177-79, 7182-83, 7194, 7227), stating: "Listen, [Wollersheim] can't tell us—I don't think he can tell us in light of his many acknowledgments in writing, in agreements between himself and the Church, that the nature of what's going on is not religious." (RT 7227).

Second, Wollersheim asserts that he was held against his will on a ship for six weeks in 1974 where he was forced to undergo "relentless 'coerced' auditing." Resp. Br. at 2. Wollersheim, however, did not testify that he was forced to go aboard the ship against his will. He stated only that at one point he attempted to leave, and that three Scientologists restrained him for a few moments, after which Wollersheim agreed to talk; after a half hour to an hour of talking, he agreed to stay. (RT 5019). There was no testimony that Wollersheim was required to undergo "relentless auditing," "coerced" or otherwise while on the ship. Most important, Wollersheim's claim of outrageous conduct was in no way limited to this single brief incident of alleged physical restraint.

Third, Wollersheim states that he "was urged by petitioner to 'disconnect' from his family because of concerns they expressed about his continued membership in the group." Resp. Br. at 2. Aside from the fact that such conduct would

be protected by the First Amendment,[7] there simply was no testimony that it occurred in this case. *See* Pet. at 6-7, 15 nn. 11-12.

Fourth, Wollersheim's account of "the nature of Scientology," Resp. Br. at 3-4, is both without record foundation and inaccurate. Suffice it to say, numerous courts have found that Scientology is a religion entitled to the protection of the First Amendment, often in cases in which the United States government has agreed and stipulated to that fact. *See* Church's Brief in Opposition to Wollersheim's Petition for Writ of Certiorari, No. 89-1369, at 5-8 & n.8.

These and other factual disputes are collateral in the context of the jury's general verdict on an intentional emotional distress claim that was based predominantly on Wollersheim's participation in auditing. If, as the Church argues, the auditing claim should have been barred or limited under the First Amendment, reversal of the verdict is required even assuming one or more of the other components of Wollersheim's emotional distress claim may have been actionable. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 289 (1964); *Claiborne Hardware*, *supra*, 458 U.S. at 917-18; *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969); *see* Church's Pet. at 20-23. Thus, this Court need not concern itself with the parties' disagreements over what was or was not proven with respect to Wollersheim's other theories of recovery. This case clearly presents the fundamental constitutional questions raised by the petition, which cry out for resolution by this Court.

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7 *See Paul* v. *Watchtower Bible & Tract Society*, 819 F.2d 875 (9th Cir. 1987), *cert. denied*, 484 U.S. 926 (1987). *But see Bear* v. *Reformed Mennonite Church*, 462 Pa. 330, 341 A.2d 105 (1975). The court of appeal noted an apparent conflict between *Paul* and *Bear*, but failed to resolve it. *See* Pet. at 20a-21a.

CONCLUSION

For the reasons stated herein and in the Petition, the petition for a writ of certiorari should be granted.

Dated: April 6, 1990

Respectfully submitted,

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